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Supreme Court, U.S.
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CASE NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREAT SENECA FINANCIAL CORP., et al.,
Petitioners,

V.

ALICE AND NORMAN KELLY, et al.,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the common law absolute privilege and absolute immunity from suit afforded to necessary participants in the judicial process, for pertinent statements made in the course of judicial proceedings, bar an action against a private lawyer and debt collector based on the content of an unsuccessful state court pleading and exhibits attached thereto, alleged to violate 15 U.S.C. §§ 1692e(2), 1692e(5), 1692e(10), and 1692f(1) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a et seq.?

2. Does the Court of Appeals have jurisdiction under the collateral order doctrine, over the interlocutory appeal of the district court's order denying a motion to dismiss an action brought under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a et seq., predicated on the common law absolute privilege and absolute immunity afforded to counsel and participants in the judicial process for pertinent statements made in the course of judicial proceedings?

PARTIES TO THE PROCEEDINGS & CORPORATE DISCLOSURE STATEMENT

Petitioners Great Seneca Financial Corporation, and Javitch, Block and Rathbone, LLP, were the defendants and appellants in the proceedings below.

Respondents Alice and Norman Kelly were the plaintiffs and appellees below.

Pursuant to Rule 29.6, there is no parent or publicly held company owning 10% or more of the corporation's stock, in Great Seneca Financial Corporation, or Javitch, Block and Rathbone, LLP.

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PETITION FOR WRIT OF CERTIORARI

Great Seneca Financial Corp. ("Great Seneca"), and Javitch, Block & Rathbone, LLP ("JB&R") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

This Petition arises from the denial of a motion to dismiss an action brought under the Fair Debt Collection Practices Act (FDCPA), premised on the content of a state court lawsuit filed by the Petitioners against the Respondents. Petitioners claim that the content of the state court pleadings are not actionable at all, to the extent the claims would have been characterized as defamatory at common law, as the common law afforded necessary participants in the judicial process, including counsel and parties, with absolute privilege and absolute immunity for pertinent statements made in the course of judicial proceedings. If actionable at all, however, Petitioners contend a restricted reading of the FDCPA is compelled by the Right to Petition, *Noerr-Pennington* doctrine, and the Commerce Clause, such that to be actionable, the pleadings must be both objectively baseless and subjectively motivated by an improper purpose. The Sixth Circuit dismissed Petitioners' interlocutory appeal for lack of jurisdiction, declined to exercise mandamus jurisdiction, and denied Petitioners' Petition for Rehearing and Suggestion of Rehearing En Banc.

The Court of Appeals, referring to absolute witness immunity and the common law immunity afforded to counsel and parties for pertinent statements made in the course of judicial proceedings as "advocacy immunity", declined to recognize the absolute nature of the immunity, its importance as a right not stand trial, the historical and reasoned basis for the absolute immunity afforded to participants in the judicial process, or the substantial public interests promoted by permitting interlocutory review. In so ruling, the Court of

Appeals placed itself in conflict with published decisions of the Second, Fourth, Fifth, and Tenth Circuit Courts of Appeals, each of which have entertained collateral order jurisdiction over comparable claims of absolute privilege asserted by private parties as a bar to state tort claims. At the same time, there is a split in the circuits as to whether privilege rulings are appealable at all under the collateral order doctrine, with the D.C. Circuit and the Third Circuit courts clearly permitting interlocutory review. There is also no precedent instructing the courts how to read the FDCPA in light of the common law absolute privilege and whether recognition of the privilege should be evaluated: (a) under the functional approach employed in Civil Rights Act cases; (b) under the federal common law; (c) under Federal Rule of Evidence 501; (d) under the Rules of Decision Act, or (e) another analytical framework. This case squarely presents an opportunity for this Court to resolve the conflict and establish a uniform federal rule.

The decision also establishes a "high order", "substantial public interest" requirement that can never be met by any private parties, thereby misreading this Court's recent decision in *Will v. Hallock*, and foreclosing collateral order appeals by private parties under the absolute witness immunity doctrine.

Review of the two issues presented is particularly warranted in this case because courts have been reading and applying the Fair Debt Collection Practices Act in ways this Court presaged, in *Heintz v. Jenkins,* courts were unlikely to endorse. *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995). Indeed, whether the FDCPA applies to pleadings at all, is a question that has divided the circuits. See *Thomas v. Law Firm of Simpson & Cybak,* 392 F.3d 914, 921-22 (7th Cir. 2004) (Evans, J., dissenting); *Vega v. McKay,* 351 F.3d 1334, 1337 (11th Cir. 2003); *Goldman v. Cohen,* 445 F.3d 152 (2d Cir. 2006).

Respondents have presented the Court with the opportunity to consider how an unsuccessful lawsuit could run afoul of the FDCPA, an issue which this Court stated it could not fathom in *Heintz v. Jenkins*, along with serious constitutional and interpretive problems posed by such an application.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-12) is reported at 447 F.3d 944. The opinion of the district court (Pet. App. 18-29) is reported at 443 F.Supp.2d 954, 2005 WL 4666560. The district court opinion denying the motion for certification to appeal is unreported (Pet. App. 13-17).

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on May 17, 2006. Petitioners timely filed their Petition for Rehearing & Suggestion for Rehearing En Banc on May 25, 2006. The Sixth Circuit denied rehearing and rehearing en banc August 31, 2006. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). This Petition is timely pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved include U.S. Constitution, First Amendment (Pet. App. 31), U.S. Constitution, Article I, Section 8 (Pet. App. 31), 28 U.S.C. § 1291 (Pet. App. 36), 28 U.S.C. § 1292(b) (Pet. App. 36-39), 28 U.S.C. § 1651 (Pet. App. 39), 15 U.S.C. § 1692e (Pet. App. 32-34) and 15 U.S.C. § 1692f (Pet. App. 34-35).

STATEMENT OF THE CASE

1. On September 10, 2003, JB&R, on behalf of Great Seneca, filed a lawsuit in the Adams County Court, Adams County, Ohio, against Alice and Norman Kelly. The complaint sought recovery in the amount of $5,389.15 against the Kellys, for a charged-off and assigned credit card debt. (Pet. App. 18-19). Attached to the Adams County complaint as Exhibit A, was a form prepared by Great Seneca, listing the account number (xxxx-xxxx-xxxx-1880), a closing date of July 28, 2003, a past due amount of $5,389.15, notice that the original debt was held by Direct Merchants Bank, and subsequently assigned to Great Seneca. (Pet. App. 18-19). The Kellys obtained counsel, answered the Adams County complaint, and served discovery including a unilaterally scheduled corporate deposition and notice duces tecum. Prior to responding to the discovery requests, JB&R dismissed the Adams County case voluntarily without prejudice. (Id.).

2. On September 9, 2004, the Kellys filed a complaint in the U.S. District Court for the Southern District of Ohio, alleging that the content of the state court lawsuit violated 15 U.S.C. §§ 1692d, 1692e(2), 1692e(5), 1692e(10), and 1692f(1) of the Fair Debt Collection Practices Act (FDCPA). The complaint asserted jurisdiction pursuant to 15 U.S.C. § 1640(e), 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1337. (Id.) The complaint alleged that the state court complaint sought more money than Great Seneca was entitled to collect; that no means existed to prove that the debt was owed; and that the Great Seneca statement was "bogus" as it did not reflect the Kellys' obligation with the original creditor and did not amount to a complete account, as required by Ohio's Civil Rule 10(D). (Id.).

Petitioners moved to dismiss the complaint, arguing that Respondents' claims were barred by the common law absolute privilege and immunity afforded to counsel and parties, for pertinent statements made in the course of judicial proceedings. In distinguishing the district court's prior decisions that rejected immunity defenses in the context of FDCPA claims, Petitioners pointed to First Amendment and Commerce Clause jurisprudence and common law immunity for comparable tort claims, as well as history, reason, and consistency of purpose, as informing the court's decision.

The district court denied the motion, as to all but one claim. (Pet. App. 26-29). The court held that the FDCPA applies to "testimonial" documents and to pleadings filed in state court debt collection actions." (Pet. App. 22-23). Further, the court held that "Congress clearly intended to regulate the 'process' of debt collection, and nothing suggests that Congress intended to absolutely immunize legal proceedings from the statute's reach . . . ." (Pet. App. 23). Further, the court observed that after Congress repealed the attorney exemption from the FDCPA, this Court unanimously held that the FDCPA applies to lawyers' "litigation activities." (Pet. App. 23).

As to the common law privilege and immunity afforded to necessary participants in the judicial process, the court noted that the privilege existed under state law, not federal law, and that this court's decision in *Heintz v. Jenkins* "cuts squarely against . . . [the] argument" that federal common law supported the privilege. As to the First Amendment and Commerce clause concerns raised by Petitioners, the court held that these issues could not "overcome the unambiguous text of the statute and the unambiguous holding of *Heintz v. Jenkins*, which this Court must follow." (Pet. App. 25).

Petitioners sought interlocutory review and filed a motion for certification to appeal pursuant to 28 U.S.C. § 1292(b), which the district court denied. (Pet. App. 13-17). The district court made clear in its order denying certification, that it interpreted *Heintz v Jenkins* as foreclosing any doubt that all litigation engaged in by debt collection lawyers was covered by the Act. "*Heintz* is controlling authority. Until the Supreme Court revisits *Heintz*, and in the absence of any response by Congress to amend the FDCPA, there can be no 'substantial ground for difference of opinion' whether the FDCPA applies to lawyers' litigation activities." (Pet. App. 17).

3. Petitioners filed a notice of appeal seeking collateral order review under 28 U.S.C. § 1291. The Court of Appeals declined to exercise jurisdiction to review district court order. Although the court had decided a private party's interlocutory absolute witness immunity appeal days before *Will v. Hallock* was decided, the court required the parties to discuss *Will* at argument. (Pet. App. 1-12).

Petitioners argued, both in their February 2, 2006 FRAP 28(j) letter, and at argument, that the order was appealable pursuant to the collateral order doctrine, recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) because the order constituted a conclusive determination of the disputed issue, it was completely separate from the merits of the action, and because the order was not effectively reviewable on appeal from a final judgment. Petitioners argued that their claim of immunity was premised on a right not to stand trial, and was effectively unreviewable after final judgment. Addressing the substantial public interest at stake, Petitioners observed that their claim of immunity, and the interest promoted on appeal, rested on the substantial public interest in preserving the integrity of the judicial process and the free and unfettered administration of justice.

The Sixth Circuit first determined that *Will* did not support collateral order review of all claims of absolute immunity, "regardless of the function that the litigant served." (Pet. App. 6). Additionally, the court read *Will* to require that a claimant asserting absolute immunity must also demonstrate the functional imperilment of a substantial public interest, independent from the purpose underlying the claim of immunity. The court observed official, sovereign and Presidential immunity lead to distinct injuries, apart from the right not to stand trial. (Pet. App. 6-8). Citing distraction from performing official duties, indecisiveness by public officials and cost to the public fisc as examples, the court held witness immunity "protects no substantial public interest of a comparable 'high order' as those identified in *Will*." (Pet. App. 8). Regarding the immunity afforded by the common law to advocates and parties to judicial proceedings, the court first observed it was never regarded as a right not to stand trial. (Pet. App. 9). Further, the court, assuming arguendo that the common law did afford advocates and parties a right not to stand trial, held that the interest in such an appeal was not of a "comparable 'high order'" to the interests identified in *Will*. (Pet. App. 10). The court concluded that Petitioners did not demonstrate how denying an immediate appeal would imperil a substantial public interest. (Pet. App. 10). The court did not discuss or consider any of the cases Petitioners cited at argument or in their FRAP 28(j) letter concerning *Will*.

The Sixth Circuit then determined mandamus relief was unwarranted because Petitioners could appeal after final judgment; and because "the district court's denial of immunity is at least facially consistent with . . . [its] opinion in *Todd* [*v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432 (6th Cir. 2006), cert. denied 10-2-06, Case No. 06-123], the district court's order is not clearly erroneous, does not demonstrate an oft-repeated error, does not demonstrate disregard for federal law or procedure, and does not raise

issues on the merits so new and important as to warrant mandamus relief." (Pet. App. 10-11).

REASONS FOR GRANTING THE PETITION

I. The decision below raises important questions of first impression that should be settled by this Court.

A. Common law absolute privilege and absolute immunity bars FDCPA claims against counsel and debt collectors, alleging the content of state court pleadings contain false or misleading representations, because the claims are comparable to common law defamation actions. In England, as far back as the time of Lord Coke,[1] anything said or written in the context of a legal proceeding was absolutely privileged. T.L. Anenson, *Absolute Immunity From Civil Liability: Lessons For Litigation Lawyers*, 31 Pepp. L. Rev. 915, 918-919 (2004) (referring to *Brook v. Montague*, 79 Eng. Rep. 77, 77 (K.B. 1606)). Lord Mansfield's 1772 announcement of the 'comprehensive rule' in *Rex v. Skinner*, 98 Eng. Rep. 529, Lofft 55, 55 (1772) that . . . . "[n]either party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office[,]" was adopted and recognized as the universal rule under the common law of the United States. *Sacks v. Stecker*, 60 F.2d 73, 75 (2d Cir.1932)(Hand, J.)(quoting *Andrews v. Gardiner*, 224 N. Y. 440, 446, 121 N. E. 341, 343, (1918)(Cardozo, J.)(quoting *Rex v. Skinner*, Lofft, 55)).

Lord Mansfield's "comprehensive rule" governing litigation, made up a "cluster of immunities" protecting all participants in the judicial process, and is "as old as the law

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[1] Lord Coke (1552-1634) "was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King's Bench." *Payton v. New York*, 445 U.S. 573, 596 n.36 (1980).

itself". T.L. Anenson, *Absolute Immunity From Civil Liability: Lessons For Litigation Lawyers*, 31 Pepp. L. Rev. 915, 918-919 (2004); *Butz v. Economou*, 438 U.S. 478, 512 (1978). See also e.g., *Stackpole v. Hennen*, 6 Mart.(n.s.) 481, 1828 Westlaw 1548, *3 (La. 1828)(citing *Blackstone's Commentaries vol.* 3, 29).

Common law absolute immunity from suit for pertinent statements made in judicial proceedings has been recognized by this Court as an absolute privilege and an absolute bar to a defamation action against a private lawyer and parties to judicial proceedings. *Briscoe v. LaHue,* 460 U.S. 325, 331-33, nn. 10-12 (1983); *Burns v. Reed,* 500 U.S. 478, 489-90 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993).

Federal courts have applied the absolute immunity or the litigation privilege in the face of federal statutory claims and for state claims based on federal proceedings. See *Ball Corp. v. Xidex Corp.,* 967 F.2d 1440 (10th Cir.1992)(defamation claims based on PTO proceedings); *Kirk v. Hendon* (In re Heinsohn), 231 B.R. 48 (Bankr. E.D. Tenn. 1999), aff'd. 247 B.R. 237, 244-45 (E.D. Tenn. 2000)(bankruptcy trustee absolutely immune under federal common law of derived judicial immunity); *Zdenek Marek v. Old Navy (Apparel) Inc.*, 348 F.Supp.2d 275, 283 (S.D.N.Y.2004)(PTO cancellation proceedings could not serve as basis for state law tortious interference claims); *McQueen v. U.S.*, 264 F.Supp.2d 502, 512 (S.D.Tex. 2003)(absolute witness immunity in *Bivens* action); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074 (7th Cir.1998)(Title VII and ADA retaliation claims); *Auriemma v. Montgomery,* 860 F.2d 273, 278 (7th Cir.1988), cert. denied, 492 U.S. 906 (1989)(qualified immunity under FCRA); *General Motors Corp. v. Mendicki*, 367 F.2d 66, 70-71 (10th Cir. 1966)(absolute privilege precluded subsequent defamation suit for statements made in proceedings under NLRA);

Waterloov Gutter Protection Systems Co., Inc. v. Absolute Gutter Protection, L.L.C., 64 F.Supp.2d 398, 414 (D.N.J.1999)(finding state litigation privilege to be consistent with federal interests).

The absolute immunity from suit has been extended to claims made against an attorney under the FDCPA. *Etapa v. Asset Acceptance Corp.*, 373 F.Supp.2d 687 (E.D. Ky. 2004); *Beck v. Codilis & Stawiarski, P.A.*, 2000 Westlaw 34490402 (N.D. Fla. 2000).

B. Whether the common law absolute privilege and absolute immunity afforded to pertinent statements made in the course of judicial proceedings applies to claims under the FDCPA based on the content of pleadings filed in collection actions, is a question of first impression with no clear analytical framework for analysis. There are five analytical frameworks available to answer the question, and no guidance exists on which framework is correct. First, there is a wealth of precedent under 42 U.S.C. § 1983 for determining whether government officials are entitled to absolute immunity. Second, utilizing statutory construction, common law principles are understood to apply unless a statutory purpose to the contrary is evident. Third, as an evidentiary privilege under Federal Rule of Evidence 501, history and reason must support the recognition of the privilege. Fourth, whether an immunity is recognized under the federal common law, turns on consistency of purpose between the aims of the statute and the aims of the common law. Finally, First Amendment concerns and the canon of avoidance, may curb a plain meaning analysis when the interests at stake involve petitioning activity. As such, if actionable, Petitioners contend a restricted reading of the FDCPA is compelled by the Right to Petition, *Noerr-Pennington* doctrine, and the Commerce Clause, such that to be actionable, the pleadings must be both objectively baseless and subjectively motivated by an improper purpose.

1. In addressing absolute immunity under 42 U.S.C. § 1983, this Court has employed a functional approach, examining the immunity available at common law, the risk of vexatious litigation, and safeguards to prevent abuses of authority. *Burns v. Reed,* 500 U.S. 478 (1991); *Mitchell v. Forsyth,* 472 U.S. 511, 521-22 (1985).

Beginning with an examination of the function performed, filing a complaint with a court invoking the adjudicative process in the traditional role of an advocate or party, is the penultimate function which Petitioners seek to preserve by the asserted immunity defense here. Petitioners' identity is not a relevant consideration. *Forrester v. White,* 484 U.S. 219, 230 (1988).

As set forth above, Petitioners claim of immunity has a well-recognized pedigree at a common-law, as an absolute privilege to defamation actions. *Tower v. Glover,* 467 U.S. 914 (1984); *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369, 1371 (10th Cir.1991), cert. denied 502 U.S. 1091 (1992).; *see also Tower v. Glover,* 467 U.S. 914, 922-23 (1984); *Burns,* 500 U.S. at 497-98 (Scalia, J., concurring in judgment in part and dissenting in part) (common law tradition of immunity is a necessary, but not sufficient, condition of absolute immunity in § 1983 actions). The common law distinguished between defamation actions and actions for malicious prosecution against counsel or parties, with only the former recognized as falling within the absolute privilege. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Col.L.Rev. 463, 469-71(1909). In a defamation action, when the plaintiff seeks to hold a party, counsel or a witness "liable only for the defamatory effect of his testimony [or statement], and in such an action he enjoyed absolute immunity upon a threshold showing that the allegedly defamatory statements were relevant to the judicial proceeding." *White v. Frank,* 855 F.2d 956, 959 (2d Cir.1988) (citing *Briscoe v. LaHue,* 460 U.S. 325, 330-32 & n. 11 (1983)). Defamation is defined as a false publication

that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business. *Garrison v. State of La.*, 379 U.S. 64, 73 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12-13 (1990). In a malicious prosecution action, however, the plaintiff attempts to hold the defendant "liable for his role in *initiating* a baseless prosecution . . . ." *Id.* As a result, "[c]omplaining witnesses were not absolutely immune at common law." *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

The privilege existed at common law because involvement in the judicial process posed a distinct risk of vexatious, retaliatory litigation. *Imbler v. Pachtman*, 424 U.S. 409, 426, n. 23 (1976); see also *id.*, 424 U.S. 409, 439 (White, J. concurring).

Lastly, while Congress may have been concerned that safeguards to prevent extrajudicial consumer abuse by debt collectors were not present in 1977, and that consumers were being abused by debt collectors hiding behind law degrees in 1986, participation in the judicial process under the supervision of state court judges in accordance with state court procedures, subject to the regulation of the bar, clearly constitute adequate procedural safeguards to prevent abuse. See *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997), cert. denied, 523 U.S. 1022 (1998); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074 (7th Cir.1998); *Auriemma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988) *cert. denied*, 492 U.S. 906 (1989) ("there are sufficient safeguards in the judicial process to protect litigants from overzealous advocates.").

Thus, to the extent the Respondent's complaint alleges that the state court complaint and its attachment falsely represented the character, amount or legal status of the debt, in violation of 15 U.S.C. § 1692e(2) and § 1692e(10),

and to the extent the complaint alleged that the complaint contained a threat to take action that could not legally be taken or to collect an amount that was not permitted by law, in violation of 15 U.S.C. § 1692e(5) and 15 U.S.C. § 1692f(1), the claims are not actionable and are barred by common law absolute immunity.

2. It is a truism that the "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *U.S. v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Federal Savings & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)). See also *Malley v. Briggs*, 475 U.S. 335, 339 (1986); *Wyatt v. Cole*, 504 U.S. 158, 170-175 (1992) (Kennedy, J., concurring); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); 2A Sutherland, Statutory Construction § 50:1-§ 50:5 (6th Ed. 2005).

In *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432 (6th Cir. 2006), cert. denied 10-2-06, the Sixth Circuit held that common law immunities were not abrogated when Congress enacted the FDCPA. *Todd*, 432 F.3d 434, 439. The opinion utilized a functional analysis to determine whether the party claiming absolute immunity was entitled to do so at common law, noting that absolute immunity was reserved "for individuals when they functionally serve as 'integral parts of the judicial process,' such as judges, advocates, and witnesses in their ordinary judicial roles." *Todd*, 432 F3d. 446-47. (quoting *Briscoe*, 460 U.S. at 335). Compare with *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074-75 (7th Cir.1998)(discussing method for recognition of a federal common-law absolute litigation privilege modeled after state law litigation privilege in federal question cases).

3. History, reason and consistency of purpose, all support recognition of the common law absolute privilege and

immunity for pertinent statements made in the course of judicial proceedings as a bar to actions under the FDCPA.

Recognition of common law absolute immunity here promotes the use of the state judicial process as a crucible for ascertaining the truth, which in turn, affords consumers all the process they are due. Requiring a debt collecting Plaintiff to demonstrate in the course of a judicial proceeding that it is entitled to recovery of a given amount in accordance with the Rules of Court, before it is entitled to collect from a consumer, necessarily entails notice, an opportunity to appear and defend, and a determination by a neutral fact-finder on the debt collector's right to collect a particular amount from a given consumer. The process is supervised by judges empowered to determine the truth, sanction misconduct, and regulate procedure. If a debt collector were denied absolute immunity for the content of pleadings, it would discourage the use of judicial means to prove the validity of debts, and promote extra-judicial means of collection.

4. The underlying purpose of the common law immunity is to afford the participants "breathing room" to speak without fear of reprisal, so that the court can determine what the truth is. *Briscoe v. LaHue*, 460 U.S. 325, 335. The tripartite purposes of the FDCPA include, protecting consumers from abusive debt collection practices, establishing a level playing field for debt collectors, and promoting consistent state action. 15 U.S.C. § 1692(e). At its core, one could characterize the purpose of the FDCPA as requiring truthful communications between debt collectors and consumers concerning debts. Because the two have a consistent purpose, recognition of absolute immunity here would be proper.

When the FDCPA was enacted in 1977, it exempted attorneys at law from its scope. Regulation of the debt collection industry was necessitated by late night telephone calls, threats of harm, harassing letters, disclosures of

embarrassing debt information to employers, neighbors and family. S. Rep. No. 382, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1696; see also H.R. Rep. No. 131, 95th Cong., 1st Sess. 16 (1977). Thus, when enacted, the FDCPA had no application to civil litigation and the content of attorney pleadings. In 1986, Congress amended the Act to repeal the attorney exemption because the exemption was being abused. The House report accompanying the Amendment, referred to the country's largest collection law firm's volume practice, observing that "92% of the accounts handled that year did not involve legal action." H.R. Rep. No. 405, 99TH Cong., 1ST Sess. 1985, 1986 U.S.C.C.A.N. 1752 (11-26-85). When introduced on the floor of the House, the same reasons were cited in support of the Amendment, and the Bill was characterized as "a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong.Rec. H10534-02 (Remarks of Rep. Annunzio)(12-2-85). It was characterized as a fairness measure, so that debt collectors and lawyers engaging in the same collection activities would be subject to the same standards. *F.T.C. v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980)("We do not believe Congress intended to shield one debt collection business from investigation simply because it is owned by an attorney, while subjecting other debt collectors to scrutiny by the FTC.").

Indeed, before Congress amended the FDCPA in 1986 and removed the attorney exemption, Congress understood that the function performed by traditional debt collectors did not include litigation. In 1983, the Federal Debt Collection Act was enacted. See 31 U.S.C. § 3718. Pub.L. 97-452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2473. When it was originally enacted, debt collectors acting on behalf of the United States were not authorized to undertake legal action on behalf of the agency to collect those debts. S. Rep. No.

378, 97TH Cong., 2ND Sess. 1982, 1982 U.S.C.C.A.N. 3377. In 1986, Congress determined that the threat of litigation was a valuable tool in the arsenal of a debt collector, which traditional debt collectors did not have, and found it both necessary and desirable to authorized federal agencies to contract with private law firms to not only collect debts, but to initiate litigation on behalf of the United States. Pub.L. 99-578, § 1, Oct. 28, 1986, 100 Stat. 3305; H.R. Rep. No. 909, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5605, 5606-07, 1986 Westlaw 31948.

Congress, moreover, knows how to regulate the procedures employed in litigation, but has delegated substantially all its authority in this regard to this Court. See 28 U.S.C. §§ 3001-3308, 3003(f)(making the Federal Rules of Civil Procedure applicable to claims under the Federal Debt Collection Act). See also 28 U.S.C. § 2072 (Rules Enabling Act); 4 Wright & Miller, Federal Practice & Procedure Civ. 3d § 1001 (2002).

Thus, Congress was aware of the fundamental distinction between a traditional debt collection agency and a lawyer engaged to collect a debt – one could litigate in a court of law, the other could not.

The attorney conduct which the FDCPA amendment was intended to reach, therefore, was the same conduct regulated by the act before the repeal of the attorney exemption. The Amendment was intended to apply the same rules to both traditional debt collectors and attorney debt collectors. In point of fact, because traditional or lay debt collectors do not engage in litigation as they lack a license to practice law, the Act does not impose any litigation-related duties on lay debt collectors. As a fairness measure, Congress could not have intended to extend the scope of the Act to regulate conduct that lay debt collectors could never engage in. By applying the FDCPA to complaints, the Act would

impose greater obligations on attorney debt collectors than it does on lay debt collectors. This is not what Congress intended. *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir.1997); *Amond v. Brincefield, Hartnett & Associates, P.C.*, 175 F.3d 1013 table, 1999 Westlaw 152555, 3 (4th Cir.1999).

5. The imposition of strict liability for the content of pleadings under the FDCPA runs counter to the Court's Right to Petition, Free Speech and *Noerr-Pennington* cases, holding liability cannot attach to petition contents unless malice & absence of probable cause are shown. *McDonald v. Smith*, 472 U.S. 479, 484 (1985); compare with *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1*, 468 Mich. 722, 735-55, 755-62 664 N.W.2d 728 (2003)(Young, J. Concurring & Cavanagh, J. dissenting)(Right to Petition embodies absolute immunity from defamation claims). Filing a complaint in court is a form of petitioning activity protected under the First Amendment's Right to Petition. *McDonald v. Smith*, at 484 & 486-487, 490. While *McDonald* stated that no absolute privilege existed under the Petition Clause, it nonetheless required application of the actual malice standard enunciated in *New York Times v. Sullivan*, before liability can attach. 376 U.S. 254 (1964). The common law may permissibly afford greater protection that the minimum protection afforded under the First Amendment Right to Petition. See *Webster v. Sun Co., Inc.*, 790 F.2d 157, 161 (D.C. Cir.1986). The *Noerr-Pennington* doctrine is understood as both a defense to liability and a rule of statutory construction. *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 930-31 (9th Cir. 2006).

The Circuit Courts that have evaluated claims under 15 U.S.C. § 1692e and §1692f have applied an objective test, based on the understanding of the "least sophisticated consumer" or the "unsophisticated consumer", in determining whether a communication from a debt collector violates the act. *Clark v. Capital Credit & Collection, Inc.*, 460 F.3d

1162 (9th Cir. 2006); *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324 (6th Cir. 2006); *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 995 (7th Cir. 2003); *Duffy v. Landberg*, 215 F.3d 871, 874 (8th Cir. 2000); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir.1997); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir.1996); *United States v. National Financial Servs., Inc.*, 98 F.3d 131, 136 (4th Cir.1996); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985). Likewise, the same courts have held the statute is a strict liability statute. See e.g., *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 995 (7th Cir. 2003).

Under the District Court's analysis, every unsuccessful state court lawsuit that asserts an amount of money is owed, would be actionable under 15 U.S.C. § 1692e(2), § 1692e(5) and § 1692e(10) as a "false" statement or as an attempt to collect an amount that was not permitted by law. (Pet. App. 25-28). Yet, under the *Noerr-Pennington* doctrine, qualified immunity from suit is provided to parties who are claimed to have violated a federal law, unless there is a showing in a retaliatory federal suit that a prior suit was both objectively baseless and subjectively motivated by an unlawful purpose. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002).

In construing acts of Congress, the principal aim is to give effect to the intent of the legislature. *Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001); *U.S. v. Ron Pair Ent. Inc.*, 89 U.S. 235 (1989). "Although many expressions favoring literal interpretation may be found in the cases, it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, . . . or such interpretation leads

to absurd results, . . . the words of the statute will be modified to agree with the intention of the legislature." 2A Sutherland Statutory Construction § 46.7 (6th Ed. 2005); *Carchman v. Nash*, 473 U.S. 716 (1985). The plain meaning will also yield when application of an Act of Congress implicates interests protected by the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983). See also *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

Here, the context in which Plaintiffs' claims arise – the content of a complaint filed in a state court seeking an adjudication of the amount owed on a debt - "stands apart" from other forms of conduct, and "runs headlong" into core values protected by the First Amendment, warranting a departure from a literal application of the Act. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525.

Further, although Commerce Clause legislation may be construed broadly, Congress' exercise of its power to regulate interstate commerce is bridled by the First Amendment. *New York v. U.S.*, 505 U.S. 144, 156 (1992) ("under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.").

The canon of avoidance, a maxim of statutory construction urged by Petitioners below, requires the Court to adopt a construction which tends to avoid substantial constitutional questions. 2A Sutherland, Statutory Construction § 44A:19 (6th Ed. 2005 update); *Clark v. Martinez*, 543 U.S. 371, 380-83 (2005) (canon of avoidance rests on the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the

court must adopt the interpretation that upholds the law's constitutionality. 2A Sutherland, Statutory Construction § 45.11 (6th Ed. 2005).

Additionally, the content of state court pleadings and regulating the practice of law, are areas traditionally recognized as falling within the ambit of state concern. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); see also *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). While Congress clearly indicated that the FDCPA was enacted under its Commerce Clause powers, "existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *U.S. v. Morrison*, 529 U.S. 598, 614 (2000). Nor does the mere expression of commerce clause authority constitute a clear and manifest intent to displace state regulation that would radically readjust the balance between state and national authorities in an area of traditional state concern. 15 U.S.C. § 1692(d); *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). If the FDCPA is read to regulate the content of pleadings filed in state court, imposing a strict liability standard in place of Ohio Civil Rule 11, it would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *United States v. Lopez*, 514 U.S. 549, 556-57, (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Because "Congress has neither provided nor suggested any substitute for the . . . traditional state court procedure for collecting damages . . . ", the Commerce Clause and continued coexistence by dual systems of government requires this Court to construe the FDCPA as not reaching this far. *United Const. Workers, Affiliated with United Mine Workers of America v. Laburnum Const. Corp.*, 347 U.S. 656, 664 (1954).

Respondents' claims fall within the classic framework of the *Noerr-Pennington* doctrine; as such, the district court

should have rejected the proposed application of the strict liability standards of the FDCPA and recognized that the content of pleadings enjoy constitutional protections. Absent recognition of this protection, and reading an objectively baseless and improper subjective motivation requirement into the Act, the FDCPA would have to be struck down as unconstitutionally vague or overbroad under the First Amendment. This Court has never upheld a state or federal law permitting the imposition of strict liability for defamatory speech, and defamatory pleadings, as petitions within the meaning of the First Amendment, enjoy at least as much protection, if not more.

Further, no intent to abrogate common law immunity appears in the legislation or its legislative history, and because the common law afforded all necessary participants in the judicial process with absolute immunity for pertinent statements made in the course of judicial proceedings, it is necessary to reconcile the competing interests of consumer protection set forth in the Act, the Right to Petition, state regulation of litigation procedures by the states, and the absolute immunity afforded under the common law, into a workable framework.

At a minimum, this case squarely presents this Court with an opportunity to consider the extent to which the Act governs the conduct of state court litigation and to define the proper mode of analysis for Petitioner's claim of absolute immunity for the content of pleadings.

II. Review is required to resolve a conflict among the Circuits concerning collateral order jurisdiction over the denial of a claim by a private litigant's claim of common law absolute immunity for pertinent statements made in the course of judicial proceedings.

The Sixth Circuit decision conflicts with published decisions of the Second, Fourth, Fifth, and Tenth Circuit Courts of Appeals, which have exercised collateral order jurisdiction over claims of absolute immunity asserted by private parties as a bar to tort claims. See *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369 (10th Cir. 1991); *Shanks v. Allied Signal,* 169 F.3d 988 (5th Cir. 1999); *Smith v. McDonald,* 737 F.2d 427 (4th Cir. 1984), aff'd. *McDonald v. Smith*, 472 U.S. 479 (1985); *Boice v. Unisys Corp.*, 50 F.3d 1145 (2d Cir. 1995).

In *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369, 1370 (10th Cir. 1991), the 10th Circuit entertained a collateral order appeal from the denial of a motion to dismiss or summary judgment in a diversity action brought against, among others, Herzfeld & Rubin, P.C. ("H&R"). The plaintiffs claimed H&R was liable for fraudulent statements made in the course of discovery in connection with prior litigation. 940 F.2d 1369, 1373-74. H&R claimed that absolute immunity was afforded at common law to private lawyers for statements made in the course of judicial proceedings. 940 F.2d at 1370. Finding no common law predicate that afforded private lawyers with absolute immunity from claims of fraud, the 10th Circuit affirmed the denial of absolute immunity, noting however, that this Court's immunity case law supported absolute immunity for defamation claims brought against private lawyers.

In *Shanks v. Allied Signal*, 169 F.3d 988, 992 (5th Cir. 1999), the plaintiff, an air mechanic, alleged that Allied Signal, a designated party to an airplane crash investigation undertaken by the NTSB, had conspired to manipulate the investigation and provided false and misleading information to the NTSB, all of which led to a false accident report and criminal charges against him. 169 F.3d 988, 990-91. Shanks diversity action alleged Allied committed various torts; Allied argued that it was immune from tort liability under the common law of Texas, which afforded an absolute privilege

for statements made in the course of judicial, quasi-judicial or legislative proceedings. Recognizing that the privilege was more properly characterized as a form of absolute immunity, the court observed that the immunity "was not a mere defense, and that such communications were not actionable at all." 169 F.3d at 992. The court, in addressing its jurisdiction from an order denying Defendants' motion for summary judgment, observed that this form of immunity was "'effectively unreviewable' once the defendant is forced to go to trial, because he or she is permanently deprived of the right to avoid the burdens of litigation." 169 F.3d at 991-92.

In *Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984), the plaintiff David Smith brought a state court libel action against Robert McDonald, that was removed to federal court on diversity grounds. McDonald, a private individual that wrote letters to the President of the United States and members of Congress, suggesting that Smith was not fit to be appointed as a U.S. Attorney. 737 F.2d 427, 427. McDonald moved for judgment on the pleadings, asserting that the letters were absolutely privileged under the petition clause of the First Amendment. In evaluating its jurisdiction, the Court found the claim of absolute immunity met the requirements for a collateral order appeal because:

> It is a final disposition of a claimed right which is independent from the subject matter of the libel action. It resolves an issue that cannot be effectively reviewed after final judgment. Deferral would defeat McDonald's claim that he should not be put to trial, which is the initial protection of absolute privilege. Finally, the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question because other courts have concluded that a petitioner is entitled to absolute privilege.

Smith v. McDonald, 737 F.2d 427, 428. In affirming the Fourth Circuit's determination that the Right to Petition affords only qualified immunity for petitions, this Court, in *McDonald v. Smith*, 472 U.S. 479 (1985), noted that the interlocutory appeal under the collateral order doctrine was proper in that case, because the appeal raised a "'serious and unsettled' question concerning absolute immunity." 472 U.S. 479, 482, n. 3 (citing *Nixon v. Fitzgerald,* 457 U.S. 731, 742-743 (1982)).

In *Boice v. Unisys Corp.*, 50 F.3d 1145 (2d Cir. 1995), a New York Inspector Generals' investigation of bogus entertainment expense vouchers, led to the production of documents by Unisys, which falsely identified the plaintiffs, state employees, as recipients of Unisys entertainment. The plaintiffs claimed that they were libeled by the production of the vouchers, without an accompanying explanation. Unisys removed the action to federal court under diversity jurisdiction, and on Defendant's motion to dismiss, the district court rejected the assertion that Defendants had absolute immunity to the defamation action. Defendants took an interlocutory appeal, and in assessing whether the appeal satisfied the collateral order doctrine, the court observed that:

> Because the immunity is designed to insulate an individual from litigation, an order denying total immunity is conclusive, and meets the first *Gulfstream* prong. The second prong is met because the existence of absolute immunity, a privilege against suit, is entirely separate from the merits of the claim. . . . And, the third prong is satisfied because the "essence" of the immunity is a right not to go to trial,. . . and it would be toothless if the holder could not obtain interlocutory review.

See also *Alternate Fuels, Inc. v. Cabanas*, 435 F.3d 855, 858 (8th Cir. 2006)("An interlocutory appeal also lies from a

denial of absolute privilege.")(denial of motion for summary judgment on claim of tortious interference with contract); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)(collateral order appeal over denial of California anti-slapp motion); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996)(appeal from denial of motion for summary judgment asserting absolute immunity to defamation claims); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. App. 2001)(collateral appeal of order denying claim of absolute immunity by private lawyer sued for defamation); *Messina v. Krakower*, 439 F.3d 755, 760 (D.C.Cir. 2006)(affirming grant of summary judgment in favor of lawyer sued for defamation).

Although the foregoing cases predate *Will v. Hallock*, they are inconsistent with the opinion of the Sixth Circuit, as none of the foregoing courts required a private party to demonstrate a distinct injury emanating from a high order public interest. Further, *Will v. Hallock* considered whether the denial of a motion to dismiss under the FTC Act's judgment bar gave the Court of Appeals jurisdiction under the collateral order doctrine. *Will v. Hallock*, __ U.S. __, 126 S.Ct. 952, 957, 959 (2006). As the Court's opinion in *Will* neither addressed the claim of absolute immunity raised by the Petitioners, nor purported to narrow the already narrow scope of the collateral order doctrine to exclude absolute immunity appeals by non-governmental parties, the Sixth Circuit misread *Will* as precluding the exercise of jurisdiction over this appeal.

Likewise, although Petitioners here did not claim that they had a right to appeal under the witness immunity doctrine, the Sixth Circuit decision also held that absolute witness immunity would not support collateral order jurisdiction, closing the door to further collateral order appeals by private litigants in the wake of the Sixth Circuit

decision in *Todd v. Weltman, Weinburg and Reis Co. LPA*, 434 F.3d. 432 (6th Cir. 2006), cert. denied 10-2-06. In this regard the decision conflicts with reported decisions of the D.C, Second, Ninth, Tenth and Eleventh Circuit Courts of Appeals, which have held collateral order jurisdiction may be exercised to review the denial of a claim of absolute witness immunity. See *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001); *Jones v. Cannon*, 174 F.3d 1271, 1280-81, 1288 (11th Cir. 1999); *Anthony v. Baker*, 955 F.2d 1395, 1396 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 959 (2d Cir.1988); *Briggs v. Goodwin*, 569 F.2d 10, 26 (D.C. Cir. 1977).

In addition, the D.C. and Third Circuits generally permit appeals under the collateral order doctrine for claims of privilege, *U.S. v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003); *Diamond Ventures LLC v. Barretto*, 452 F.3d 892 (D.C. Cir. 2006) & *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), while the Second, Fifth, Sixth, Seventh and Tenth do not. *Chase Manhattan Bank N.A. v. Turner & Newall PLC*, 964 F.2d 159 (2d Cir. 1992); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43 (5th Cir. 1993), *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005); *Reise v. Bd. of Regents*, 957 F.2d 293 (7th Cir. 1992); *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993).[2]

Review of the Sixth Circuit decision would afford the court an opportunity to resolve the conflict.

III. Review is required because the decision conflicts with relevant decisions of this court.

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[2] Compare with *Ross v. City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2005)(entertaining collateral order review over attorney client privilege ruling). See also *Gill v. Gulfstream Park Racing Ass'n., Inc.*, 399 F.3d 391, 399 (1st Cir. 2005)(entertaining collateral order appeal on non-party claim of attorney client privilege).

Petitioners urge this Court to clarify whether *Will* requires private litigants pursuing a collateral order appeal to demonstrate the functional imperilment of a substantial public interest, independent from the purpose underlying the claim of immunity. Justice Kennedy's concurring opinion in *Wyatt v. Cole*, recognized that private parties have a right of appeal from a denial of a claim of absolute immunity. *Wyatt v. Cole,* 504 U.S. 158, 173 (1992). See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994)("When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'").[3]

Referred to as a "practical construction" of the finality requirement embodied in 28 U.S.C. § 1291, the collateral order exception to the final judgment rule permits immediate appeal if the order at issue meets the three part test for collateral order review: "that an order "'[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Will v. Hallock*, __ U.S. __, 126 S.Ct. 952, 957, 959 (1-16-2006)(quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The collateral order doctrine "accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and

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[3] First Amendment defenses are typically viewed as not immediately appealable under the collateral order exception to the final judgment rule, absent a certification under 1292(b). *Segni v. Commercial Office of Spain*, 816 F.2d 344 (7th Cir.1987); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326 (3d Cir.1999); *Meek v. County of Riverside*, 183 F.3d 962, 968-969 (9th Cir.1999); *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000). Likewise, *Noerr-Pennington* immunity as a defense, is also not subject to collateral order review. *Hinshaw v. Smith*, 436 F.3d 997 (8th Cir. 2006).

collateral to, rights asserted in the action[,]" that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) & *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

The class of orders that are immediately appealable include orders rejecting absolute immunity, qualified immunity, Eleventh Amendment Immunity and adverse rulings on a defense of double jeopardy. Id. (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 742, (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) & *Abney v. United States*, 431 U.S. 651, 660 (1977)).

Claims of absolute immunity by non-governmental litigants premised on the common law absolute immunity for pertinent statements made in the course of judicial proceedings fall within the collateral order doctrine because they satisfy each prong of the three-prong *Cohen* test. *Boice v. Unisys Corp.*, 50 F.3d 1145, 1148.

To the extent the Sixth Circuit held absolute witness immunity and absolute advocacy immunity did not support a right not to stand trial, the Court was clearly wrong. See Restatement (Second) Torts Division 5, Chapter 25, Topic 2, Title B, Comment (1977); *Boice v. Unisys Corp.*, supra; *Imbler v. Pachtman*, 424 U.S. 409, 426, n. 23 (1976)("a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well."); *Burns v. Reed*, 500 U.S. 478, 490 (1991) (quoting *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772); *Briscoe v. LaHue*, 460 U.S. 325, 330-331, 334 (1983); *Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute immunity is thus necessary to assure that judges, advocates, and

witnesses can perform their respective functions without harassment or intimidation."); *Surace v. Wuliger*, 25 Ohio St.3d 229, 235, 495 N.E.2d 939, 944 (1986); Sack on Defamation, §§ 8.2.1-8.2.1.6 (2004); Restatement (Third) of the Law Governing Lawyers § 57; See also id. at § 57(2); Restatement (Second) of Torts §§ 586, 587 (1977).

Petitioners assert that the small class of orders which are immediately appealable under the collateral order doctrine does include the interlocutory appeal from an order denying a claim of absolute immunity premised on pertinent statements made in judicial proceedings because the immunity has constitutional protection under the First Amendment. *Will* pointed to appeals that have supported immediate review, and the list includes claims of absolute immunity. *Will v. Hallock*, 126 S.Ct. 952, 958

The "particular value of a high order . . . marshaled in support of the interest in avoiding trial" cannot require private parties to show there is a purpose to their appeal distinct from the purpose underlying their claim of immunity, as the Sixth Circuit held. If this were the case, no private party could ever pursue a collateral order appeal.

Indeed, it does not appear that *Will* intended to impose such a requirement or foreclose interlocutory review of other substantial claims of absolute immunity.

The "effectively unreviewable" requirement does not, or at least should not, require a private party litigant to demonstrate that their interests in the appeal differ from the interests supporting the claim of immunity. Private party litigants could never show that their interests in an interlocutory appeal include distraction from performing official duties, indecisiveness by public officials and cost to the public fisc. Instead, their distinct injury inures only from the burden of having to stand trial where the law affords them

immunity. For example, a private party sued for defamation could not appeal from the denial of a claim of absolute immunity; or a private party engaging in state action could not appeal from the denial of a claim of qualified immunity;[4] a private attorney could not appeal from an order compelling production of information protected by the attorney client privilege; and a private judge or arbitrator could not appeal from an order denying a claim of judicial immunity.[5]

Review of the decision would also permit this Court to correct the Sixth Circuit's erroneous reading of *Will v. Hallock.*

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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[4] See *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 254 (2d Cir.1984)(collateral order appeal entertained from denial of motion for summary judgment premised on absolute witness immunity by private parties alleged to have conspired with district attorney to deprive Plaintiff of civil rights, but rejecting claim of immunity). Compare with *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 277 (5th Cir. 2001) (joining 6th, 7th, 8th 9th, 10th and 11th Circuits, holding absolute witness immunity bars claim of conspiracy to commit perjury).

[5] *Austin Mun. Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 691 (5th Cir. 1985).

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Kelly v. Great Seneca Financial Corp.,
447 F.3d 944 (6th Cir. 2006)

United States Court of Appeals, Sixth Circuit.
Alice G. KELLY; Norman P. Kelly, Plaintiffs-Appellees,
v.
GREAT SENECA FINANCIAL CORP.; Javitch, Block & Rathbone, Defendants-Appellants.
No. 05-3830.

Argued: April 27, 2006.
Decided and Filed: May 17, 2006.
Rehearing En Banc Denied Aug. 31, 2006.

Before: SUHRHEINRICH, GILMAN, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Michael D. Slodov, Javitch, Block & Rathbone, Cleveland, Ohio, for Appellants. Stephen R. Felson, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Michael D. Slodov, Javitch, Block & Rathbone, Cleveland, Ohio, for Appellants. Stephen R. Felson, Cincinnati, Ohio, Steven C. Shane, Bellevue, Kentucky, for Appellees.

OPINION

ROGERS, Circuit Judge.

The defendants in this interlocutory appeal ask us to review the district court's nonfinal order denying them, among other things, the defense of absolute witness and advocacy immunity in an action concerning unfair debt-collection practices. The preliminary issue in this case is whether this court has appellate jurisdiction to entertain the defendants' interlocutory appeal under the collateral order doctrine. Only five days after this court held in another case that we have jurisdiction to hear interlocutory appeals concerning

witness immunity, the Supreme Court of the United States decided *Will v. Hallock,* --- U.S. ----, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006), which clarified when appellate courts have jurisdiction under the collateral order doctrine. In light of *Will,* we dismiss this appeal for lack of jurisdiction. We also decline to grant mandamus relief.

I.

In September of 2003, defendant Javitch, Block & Rathbone (Javitch) filed in Ohio state court a "Complaint for Money" to collect a debt that the plaintiffs Alice and Norman Kelly allegedly owed defendant Great Seneca Financial Corporation (Seneca). When the Kellys requested discovery, Seneca voluntarily dismissed its complaint without prejudice. In 2004, the Kellys brought suit against Seneca and Javitch in federal district court, alleging violations of several provisions of the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Sales Practices Act (OCSPA). According to the Kellys, the $5,389.15 demanded in Seneca's complaint "was significantly in excess of the amount of money [the Kellys] may have owed or [Seneca] was legally entitled to collect." J.A. 10. The Kellys further claimed that Seneca and Javitch filed the debt-collection complaint "knowing that [they] did not have any means of proving that such debt was owed" and that a "bogus" account statement was attached to the complaint in an attempt to prove the debt. J.A. 10.

Seneca and Javitch responded to the Kellys' complaint by filing a motion to dismiss. They argued that (1) they are absolutely immune from suit for behavior that occurs during the course of litigation, (2) the filing of the Complaint for Money is protected by both the First Amendment and the *Noerr-Pennington* doctrine, (3) application of the FDCPA to their case exceeds Congress's power under the Commerce Clause, and (4) the Kellys failed to state a claim under several provisions of the FDCPA. The district court denied Seneca

and Javitch's motion to dismiss.[FN1]

> FN1. The district court did dismiss the Kellys' claim under § 1692(d) of the FDCPA. The district court dismissed this claim because merely filing a complaint in an appropriate venue, as alleged in the Kellys' complaint, was not sufficient to demonstrate that Seneca and Javitch had "harass[ed], oppress[ed], or abuse[d]" the Kellys. J.A. 36.

***947** Seneca and Javitch now challenge the denial of absolute immunity pursuant to the collateral order doctrine in this interlocutory appeal. They also argue that this court should exercise pendant appellate jurisdiction to consider their defenses under the First Amendment, the *Noerr-Pennington* doctrine, and the Commerce Clause.

After the parties submitted their briefs in this case, this court decided *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 434 (6th Cir.2006). *Todd* was a strikingly similar case. The plaintiff was a debtor against whom the defendant law firm, on behalf of the creditor, had filed a complaint to collect a debt. *See Todd,* 434 F.3d at 435. The plaintiff then sued the law firm that filed the complaint and alleged violations of the FDCPA. *See id.* at 434. The plaintiff moved to dismiss on grounds of, among other things, absolute immunity. *See id.* The district court denied the motion to dismiss, and the defendant then filed a motion for interlocutory appeal under the collateral order doctrine. We held that "this Court reviews the collateral order of the district court denying Defendant absolute immunity." *See id.; accord Paine v. City of Lompoc,* 265 F.3d 975, 981 (9th Cir.2001). On the merits, we held that the law firm was not entitled to absolute immunity.

Five days after we decided *Todd,* the Supreme Court of the United States unanimously decided *Will v. Hallock,* --- U.S. -

---, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006), which made clear the limited scope of the collateral order doctrine. In *Will,* the Supreme Court held that a party cannot take an interlocutory appeal from a district court's refusal to apply the Federal Tort Claims Act's judgment bar. We requested that the parties be prepared to discuss the effect, if any, of *Will* on our jurisdiction over this interlocutory appeal. At oral argument, Seneca and Javitch requested that we grant mandamus relief if we determine that we have no jurisdiction under the collateral order doctrine.

II.

"An appellate court has a duty to consider sua sponte whether appellate jurisdiction is properly invoked." *Mattingly v. Farmers State Bank,* 153 F.3d 336, 336 (6th Cir.1998) (per curiam). Despite the parties' agreement at oral argument that we should address the merits of this interlocutory appeal, "[s]ubject matter jurisdiction cannot be conferred on federal courts by consent of the parties." *Ford v. Hamilton Invs., Inc.,* 29 F.3d 255, 257 (6th Cir.1994). Our review of *Will v. Hallock* convinces us that we must dismiss this interlocutory appeal for lack of jurisdiction.

[1] Because the Supreme Court's opinion in *Will* controls the jurisdictional question in this case, we describe the case in detail. In *Will,* the Supreme Court held that a party cannot take an interlocutory appeal from a district court's refusal to apply the Federal Tort Claims Act's judgment bar. The Supreme Court began its analysis by noting that federal appellate courts have jurisdiction over only "final decisions of the district courts," *see* 28 U.S.C. § 1291, and " 'a narrow class of decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.' " *Will,* 126 S.Ct. at 956 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)).

To determine which decisions fall ***948** within this "narrow class of decisions," courts turn to the collateral order doctrine, identified in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *See id.* at 957. Orders qualify only if they conclusively decide a disputed issue that is completely independent from the merits of the case and effectively unreviewable on appeal after a final order. *See id.* (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)).

[2] The Supreme Court emphasized the "modest scope" of the collateral order doctrine. *Id.* at 958. The Court stated that the collateral order doctrine does not permit interlocutory appeal of just "any order denying a claim of [a] right to prevail without trial." *Id.* at 958. The Court explained that the assertion of a right not to stand trial is a necessary, but not a sufficient, condition for interlocutory review. *See id.* at 958-60. Consequently, "only *some* orders denying an asserted right to avoid the burdens of trial qualify ... as orders that cannot be reviewed 'effectively' after a conventional final judgment." *Id.* at 958 (emphasis added). In addition to violating an asserted right not to stand trial, the challenged order must "imperil a substantial public interest." *Id.* at 959.

[3] The Court identified four instances in which it had recognized that interlocutory appeals were proper, and the Court identified the substantial public interest in each of those four cases that the immediate appeal protects:

> (1) Immediate appeal from denials of presidential immunity protects "compelling public ends rooted in ... the separation of powers";
>
> (2) Immediate appeal from denials of qualified official immunity protects avoidance of disruption of discretionary government functions;
>
> (3) Immediate appeal from denials of sovereign immunity protects "a State's dignitary interests"; and

> (4) Immediate appeal from denials of a double jeopardy defense protects the individual from the "superior position" of the government.

Id. at 959. Applying this additional "substantial public interest" requirement to the case before it, the Supreme Court held that a district court's refusal to apply the judgment bar of the Federal Tort Claims Act is not open to interlocutory appeal. *See id.* at 956, 959-61.

A. Witness Immunity

[4] Although Seneca and Javitch have invoked their right not to stand trial under the common-law doctrine of absolute witness immunity, *see Spurlock v. Satterfield,* 167 F.3d 995, 1001 (6th Cir.1999), they have failed to demonstrate how any substantial public interest will be imperiled by delaying their appeal until after the district court enters a final order. Their first argument-that *Will* stated that collateral appeal could be had from denials of all forms of absolute immunity-is not well taken. The Supreme Court stated only that it had permitted "immediate appeal of a denial of absolute Presidential immunity," and it referred to *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), to demonstrate that collateral appeal from a denial of absolute Presidential immunity protected "compelling public ends rooted in the separation of powers." *Will,* 126 S.Ct. at 959 (citation omitted). The Supreme Court did not say that denials of all forms of absolute immunity, regardless of the function that the invoking litigant served, were immediately appealable.

Seneca and Javitch next argue that a substantial public interest undergirds witness immunity and therefore requires interlocutory*949 appeal from denials of witness immunity. Having a substantial public interest in the immunity itself,

however, does not mean that there is a substantial public interest in an interlocutory appeal. Distinguishing between the purpose of the defense/immunity and the purpose of collateral appeal ensures that we keep the "small class" of orders reviewable on interlocutory appeal "narrow and selective in its membership." *Will,* 126 S.Ct. at 958.

Absolute witness immunity strengthens the substantial public interest of having witnesses come forward and testify truthfully, *see Paine,* 265 F.3d at 982, but lack of interlocutory appeal from denials of witness immunity does not "imperil [this] substantial public interest," *Will,* 126 S.Ct. at 959. Witness immunity, as in this and most cases, protects private individuals from being subject to suit and from liability, and most of these individuals will appear as witnesses, at most, only a few times in their lives. Moreover, witness immunity concerns only statements made during trial and therefore reaches very limited conduct. Permitting suit to continue after a district court has denied a motion for witness immunity will not have any effect on the testimony already given, the witness' conduct in future proceedings (other than, perhaps, to impress upon them the importance of telling the truth), or on the public fisc. Therefore, lack of interlocutory appeal will not threaten a substantial public interest.

In contrast, interlocutory appeal from denials of official, sovereign, and Presidential immunity protects substantial public interests of a "high order." When these immunities are at issue, denial of interlocutory appeal creates an ongoing injury distinct from the official or State's right not to stand trial. Official immunity seeks to protect the ability of an official to exercise discretion in accomplishing public tasks and to prevent the official from spending time in court defending actions that are reasonably thought to be legal. *See Mitchell v. Forsyth,* 472 U.S. 511, 525-26, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Without interlocutory appeal

from district court denials of immunity, the official, by spending more time than necessary to defend himself or herself in an action, would spend less time on the tasks for which he or she was hired and cost the public additional money in defending a suit that should have been dismissed. The lack of speedy resolution of the claim also threatens the official's decisiveness in taking action while the action is proceeding to trial. Similarly, requiring a State to appear in federal court and undergo trial when it is entitled to sovereign immunity (even if it is later shielded on the merits) harms the State's dignitary interests. Lack of interlocutory appeal would cause a continuing injury to the State's dignitary interests every additional day that it must remain in federal court. Absolute Presidential immunity protects a substantial public interest in the separation of powers, and the injury continues every day that the President must remain in court because the judiciary is overseeing the actions of the nation's chief executive officer. Interlocutory appeal of denials of witness immunity, in contrast, protects no substantial public interest of a comparable "high order" as those identified in *Will.*

B. Advocacy Immunity

[5] We are also unpersuaded by the arguments of Seneca and Javitch that advocacy immunity protects them from suit and that interlocutory appeal would further a substantial public interest in judicial integrity and administration. First, although the Supreme Court has indicated in passing that the English common law provided private attorneys with some form of immunity, the Supreme Court has described the nature of that immunity only ***950** as protection from damages liability. For instance, in *Burns v. Reed,* 500 U.S. 478, 489-90, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), the Court stated, "Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common

law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses." In *Briscoe v. LaHue,* 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), the Court noted once that "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law," *id.* at 330-31, 103 S.Ct. 1108, and later that "the common law provided absolute immunity from subsequent damages liability for all persons-governmental or otherwise-who were integral parts of the judicial process," *id.* at 335, 103 S.Ct. 1108. These cases do not state that private attorneys enjoy immunity from suit, and the defendants have not pointed us to any authority demonstrating that advocacy immunity protects private attorneys from standing trial.

It is also not enough after *Will* that the nonliability that Seneca and Javitch invoke is described as an "immunity." For example, the Fourth Circuit has recently ruled that a State cannot immediately appeal a denial of "*Parker* immunity" or "state action antitrust immunity" in an antitrust action against the State because determining whether "*Parker* protection" was proper would force appellate courts to consider prematurely the merits and because the immunity issue is fully reviewable on appeal. *S.C. State Bd. of Dentistry v. F.T.C.,* 455 F.3d 436, 2006 WL 1134136 (4th Cir.2006); *see also Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1,* 171 F.3d 231, 234 (5th Cir.1999) (en banc) ("*Parker* immunity is an inapt description, for its parentage differs from the qualified and absolute immunities of public officials.... While thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation."); *Digital Equip.,* 511 U.S. at 869, 114 S.Ct. 1992 ("[D]espite Digital's position that it holds a 'right not to stand trial' ... rights under private

settlement agreements can be adequately vindicated on appeal from final judgment."). Moreover, although the privilege of a spouse not to testify or not to have his spouse testify is referred to as "spousal immunity privilege," *see, e.g., Engberg v. Wyoming,* 265 F.3d 1109, 1121 (10th Cir.2001), we have uncovered no instances where an appellate court entertained an interlocutory appeal from the denial of spousal immunity. The nature of the protection is what is important, not the loose ability of an attorney to use the term "immunity."

Second, even if we assume that advocacy immunity protects attorneys from the burdens of trial, the asserted interest that interlocutory appeal will allegedly protect-"preserving the integrity of the judicial process, and the free and unfettered administration of justice"-is not of comparable "high order" to those interests identified in *Will.* The resolution of a trial court's error following a final order will not cause lawyers to act less zealously, the administration of justice to come to a grinding halt, or judicial integrity to erode. Despite lawyers' being subject to malpractice claims and professional discipline, we have not taken interlocutory appeals from decisions denying lawyers summary defenses in those cases, and Lady Justice's balance has yet to fall. Ultimately, Seneca and Javitch have made no argument that interlocutory appeal is required to protect the substantial interest supporting advocacy immunity, and we are unable to discern how the interest in judicial integrity and ***951** administration is threatened simply because a lawyer cannot obtain an immediate appeal. Therefore, we have no jurisdiction to consider this interlocutory appeal under the collateral order doctrine.

III.

[6] Finally, mandamus relief is not warranted in this case. The Supreme Court has held that "[t]he remedy of mandamus

is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). As we held recently in *United States v. Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 473 (6th Cir.2006):

> The decision whether to grant mandamus relief involves analysis of five factors: (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; [and] (5) the district court's order raises new and important problems, or issues of first impression.

[7] Seneca and Javitch are not entitled to mandamus relief under this analysis. First, as we held in determining that interlocutory appeal is not warranted, direct appeal following a final order will protect the substantial public interests that undergird witness and advocacy immunity. Second, considering that the district court's denial of immunity is at least facially consistent with our opinion in *Todd,* the district court's order is not clearly erroneous, does not demonstrate an oft-repeated error, does not demonstrate disregard for federal law or procedure, and does not raise issues on the merits so new and important as to warrant mandamus relief.

The only factor that arguably favors the defendants is that their right to be free from the burdens of trial would be affected if they have to stand trial. But the mere fact that the defendants must proceed to trial is not enough to warrant mandamus relief. If it were otherwise, this court would have to entertain writs of mandamus whenever a district court denied any defense contained in a party's motion to dismiss. Whatever prejudice that the defendants suffer in having to

stand trial is outweighed by the other four factors that counsel against our granting this extraordinary relief. Therefore, we deny mandamus relief.

Because we have no appellate jurisdiction over this interlocutory appeal and because we deny mandamus relief, we cannot exercise pendant appellate jurisdiction to decide the validity of the defendants' other asserted defenses.

IV.

For the foregoing reasons, we dismiss this interlocutory appeal for lack of jurisdiction.

Kelly v. Great Seneca Financial Corp., unreported Slip Copy, 2005 Westlaw 2372851 (S.D.Ohio 2005)

United States District Court,S.D. Ohio, Western Division.
Alice G. KELLY and Norman P. Kelly, Plaintiffs,
v.
GREAT SENECA FINANCIAL CORP., et al., Defendants.
No. 1:04-CV-615.

Sept. 27, 2005.

Steven Charles Shane, Bellevue, KY, Stephen R. Felson, Cincinnati, OH, for Plaintiffs.

Michael D. Slodov, Javitch Block & Rathbone LLP, Cleveland, OH, for Defendants.

ORDER

BECKWITH, Chief J.
***1** Before the Court is a motion filed by Defendants Great Seneca Financial Corp. and Javitch, Block & Rathbone LLP to certify this Court's previous order, denying Defendants' motion to dismiss, for immediate appeal pursuant to 28 U.S.C. § 1292(b) (Doc. No. 25). For the reasons set forth below, Defendants' motion is not well-taken and is DENIED.

I. *Procedural History*

Plaintiffs allege that on September 10, 2003, Javitch, Block & Rathbone (JBR) filed a "Complaint for Money" against them in Adams County, Ohio Common Pleas Court. JBR filed this lawsuit on behalf of Great Seneca Financial Corp. (Great Seneca). The Kellys answered Great Seneca's state court complaint and sought discovery. However, before the Kellys received responses to their discovery requests, Great Seneca

(through JBR) voluntarily dismissed the state court lawsuit without prejudice, as permitted under Ohio Law.

The Kellys then filed this suit against Great Seneca and JBR under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq, and the Ohio Consumer Sales Practices Act (OCSPA), Ohio Rev.Code § 1345.01 et seq. They allege that a document attached to the state court complaint is "bogus" and does not accurately reflect any debt obligation they may have had with the original creditor. Relying on this document, the Kellys seek both damages and injunctive relief.

Defendants sought dismissal of the Kellys' complaint, primarily on the grounds that they were immune from FDCPA liability. They claimed that this immunity was grounded in the common law witness or litigation privilege, as well as First Amendment guarantees of freedom of speech and the right to petition the courts. By order of this Court dated June 16, 2005, Defendants' motion to dismiss was denied. In light of the right to petition and free speech clause of the First Amendment, the *Noerr-Pennington* Doctrine, the Tenth Amendment, and *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), Defendants now ask that this Court's construction of the FDCPA be certified for immediate appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b).[FN1]

> FN1. Defendants have filed an appeal as of right from the Court's denial of their claim to absolute immunity.

II. *Standard of Review*

28 U.S.C. § 1292(b) provides:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law

as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

*2 *Id.* Applying this rule, the Sixth Circuit has consistently utilized four requirements for certification for immediate interlocutory appellate review: 1) the question involved must be one of "law"; 2) it must be "controlling"; 3) there must be substantial grounds for "difference of opinion" about it; and 4) an immediate appeal must "materially advance the ultimate termination of the litigation." *Cardwell v. Chesapeake & Ohio Ry. Co.,* 504 F.2d 444, 446 (6th Cir.1974) (quoting 28 U.S.C. § 1292(b)). Further, certification of an interlocutory appeal should be granted sparingly and only in exceptional circumstances. *Vitols v. Citizens Banking Co.,* 984 F.2d 168, 170 (6th Cir.1993) (citing *Kraus v. Board of County Road Comm'rs,* 364 F.2d 919, 922 (6th Cir.1966)).

III. *Analysis*

Defendants argue that this Court's construction of the FDCPA "involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Specifically, Defendants allege that a difference of opinion exists with regard to whether the FDCPA applies to lawyers involved in litigation. *Id.* In so arguing, Defendants rely on the right to petition and speech clause of the First

Amendment, the *Noerr-Pennington* Doctrine, the Tenth Amendment, and *Heintz*. However, an examination of both the unambiguous text of the FDCPA and the Supreme Court's decision in *Heintz* reveals that there is no "substantial ground for difference of opinion" that would justify an interlocutory appeal on these issues.

The FDCPA was enacted in 1977 in an effort to calm public concerns about the use of unfair and abusive debt collection practices. *Frey v. Gangwish,* 970 F.2d 1516, 1518 (6th Cir.1992). The Sixth Circuit has noted that this Act is "extraordinarily broad." *Id.* at 1521. For example, the Act defines debt collectors as those who "regularly collec[t] or attemp[t] to collect, directly or indirectly, consumer debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6). Nothing in this definition or any other provision of the Act indicates that Congress intended to immunize attorneys from the statute's reach if they otherwise meet the definition of a debt collector. In fact, the statute's history indicates that Congress intended a lawyer's litigation activities to be subject to the FDCPA. As originally passed in 1977, the statute contained an express exemption for lawyers. This exemption stated that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub.L. 95-109, § 803(6)(F). However, Congress repealed this exemption in its entirety in 1986. In the absence of clear language to the contrary, this change indicates that Congress intended lawyers to be subject to the Act whenever they meet the definition of a debt collector.

Relying on the FDCPA's broad language and the 1986 amendment, the Supreme Court has unanimously held that the FDCPA applies to attorneys who regularly engage in consumer debt collection activity, even when that activity consists of litigation. *Heintz,* 514 U.S. at 299. Despite this binding authority, Defendants argue that they are not subject

to the FDCPA because application of the Act violates the First Amendment, Tenth Amendment, and *Noerr-Pennington* Doctrine. These claims all reflect a concern that applying the FDCPA to lawyers involved in litigation inhibits the effective practice of law. However, this concern echoes those raised in lower courts and considered by the *Heintz* Court. *Compare Jenkins v. Heintz,* 25 F.3d 536, 539 (7th Cir.1994), *affirmed by Heintz,* 514 U.S. at 294 (holding that the FDCPA does not draw a distinction between lawyers and debt collectors; despite "conceivable problems ....the Act reaches lawyers engaged in litigation.") *with Green v. Hocking,* 9 F.3d 18, 21 (6th Cir.1993), *overruled by Heintz,* 514 U.S. at 294 (holding that the FDCPA does not govern lawyers engaged solely in the practice of law; were the result otherwise, "it would be unlawful for an attorney to communicate with the court or clerk's office by filing suit."). Therefore, the rationale in *Heintz* addresses these claims.

***3** There may be a difference of opinion as to whether *Heintz* was correctly decided, but that is not the legal test for determining whether a "substantial ground for difference of opinion" exists under 28 U.S.C. § 1292(b). *Heintz* is controlling authority. Until the Supreme Court revisits *Heintz,* and in the absence of any response by Congress to amend the FDCPA, there can be no "substantial ground for difference of opinion" whether the FDCPA applies to lawyers' litigation activities.

IV. *Conclusion*

Based on the unambiguous language in the FDCPA and the Supreme Court's holding in *Heintz,* Defendants' motion for certify an interlocutory appeal of this Court's order denying Defendant's motion to dismiss is not well-taken and is DENIED.

IT IS SO ORDERED

Kelly v. Great Seneca Financial Corp., 443 F.Supp.2d 954, 2005 WL 4666560 (S.D.Ohio 2005)
United States District Court, S.D. Ohio,Western Division.
Alice G. KELLY and Norman P. Kelly, Plaintiffs
v.
GREAT SENECA FINANCIAL CORP., et al., Defendants
No. 1:04CV615.

June 16, 2005.

ORDER
BECKWITH, Chief J.
***1** Before the Court is a motion to dismiss (Doc. 8) filed by the defendants Great Seneca Financial Corporation ("Great Seneca") and Javitch, Block & Rathbone LLP, a law firm ("JBR").[FN1] Plaintiffs allege that the defendants violated the Federal Fair Debt Collection Practices Act ("FDCPA") when defendants filed a debt collection lawsuit against Plaintiffs. Plaintiffs have opposed the motion (Doc. 14), and defendants filed a reply (Doc. 16). Defendants also filed two motions, seeking leave to file supplemental memoranda (Doc. 9 and 24).

Factual Background

Plaintiffs allege that on September 10, 2003, JBR filed a "Complaint for Money" against them in Adams County, Ohio common pleas court. JBR filed the lawsuit on behalf of Great Seneca, a Maryland corporation. The state court complaint (which is attached as Exhibit A to the Complaint in this action) alleged that the Kellys owed Great Seneca $5,389.15 "upon an account." Attached to the state court complaint was a one-page account statement from Great Seneca, showing the Kellys' balance due as of July 28, 2003 was $5,389.15. The document describes the debt by stating that Great Seneca

was an "assignee of Sagres Company, assignee of Direct Merchant Bank," with an address in Rockville, Maryland.

The Kellys allege that they answered Great Seneca's state court complaint and also sought discovery from Great Seneca. Before the Kellys received responses to their discovery requests, however, Great Seneca (through JBR) voluntarily dismissed the state court lawsuit without prejudice, as permitted under Ohio law.

The Kellys then filed this suit against Great Seneca and JBR under the FDCPA, 15 U.S.C. § 1692 et seq, and the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Rev.Code § 1345.01 et seq. The Kellys allege that both Great Seneca and JBR are "debt collectors," and that the Kellys' debt is a "consumer debt," triggering application of the FDCPA. They allege that the Great Seneca document attached to the state court complaint was "bogus" and did not accurately reflect any debt obligation the Kellys may have had with the original creditor. They allege that Great Seneca and JBR violated several sections of the FDCPA and the OCSPA, and seek both damages and injunctive relief.

The defendants seek dismissal of the Kellys' complaint, primarily arguing that they are immune from FDCPA liability. They claim that this immunity is grounded both in the common law witness or litigation privileges, as well as First Amendment guarantees of freedom of speech and the "right to petition." Defendants argue that the filing of a lawsuit by an attorney in the course of client representation should not be the basis for an FDCPA claim. They also attack the constitutionality of the FDCPA as applied to their conduct of filing and then voluntarily dismissing a lawsuit. Finally, defendants argue that, if they are not absolutely immune, the Kellys' allegations fail to state a cognizable claim for relief.

ANALYSIS

*2 A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the complaint. In its consideration of a motion to dismiss under Rule 12(b)(6), the court is required to construe the complaint in the light most favorable to the Plaintiff, and accept all well-pleaded factual allegations in the complaint as true. See *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) and *Roth Steel Products v. Sharon Steel Corp.,* 705 F.2d 134, 155 (6th Cir.1983). A court, however, will not accept conclusions of law or unwarranted inferences which are presented as factual allegations. *Blackburn v. Fisk University,* 443 F.2d 121, 124 (6th Cir.1974). A court will, though, accept all reasonable inferences that might be drawn from the complaint. *Fitzke v. Shappell,* 468 F.2d 1072, 1076-77 n. 6 (6th Cir.1972).

When considering the sufficiency of a complaint pursuant to a Rule 12(b)(6) motion, this Court recognizes that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

A. *The Fair Debt Collection Practices Act.*

[1] Congress first enacted this statute in 1977 "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The Sixth Circuit has noted that the Act is "extraordinarily broad" and must be enforced as written, even when eminently sensible exceptions are proposed in the face of innocent

and/or de minimis violations. See *Frey v. Gangwish,* 970 F.2d 1516, 1521 (6th Cir.1992). The Court must evaluate the defendant's conduct under the "least sophisticated consumer" test, and objectively determine whether that consumer would be misled by the defendant's statement. *Smith v. Transworld Systems, Inc.,* 953 F.2d 1025, 1029 (6th Cir.1992).

B. *Absolute Immunity.*

[2] This Court has recently addressed arguments that are similar to those made here concerning immunity from FDCPA claims. See, *Hartman v. Asset Acceptance Corp.,* Case No. 1:03-cv-113, Order dated September 29, 2004 (Doc. 59); and, *Blevins v. Hudson & Keyse, Inc.,* et al., Case No. 1:03-cv-241, Orders dated September 29, 2004 (Docs. 20 and 21).

In *Hartman,* this Court rejected an argument that a debt collector's affidavit, filed with its state court complaint, was protected from FDCPA liability by a common law "witness" privilege. This Court also found that the FDCPA contained no "litigation or litigation-related exception" for debt collectors filing lawsuits, or for their attorneys. *Id.* at p. 14.[FN2] In *Blevins,* this Court denied motions to dismiss FDCPA claims against a law firm and the debt collector it represented. The debt collector's affidavit, attached to and incorporated by reference into a complaint the attorneys filed, stated that the debt collector was a "holder in due course" of the debt, a statement the *Blevins* Plaintiff alleged was false. This Court held that neither the debt collector nor its attorneys were absolutely immune from FDCPA liability based on their act of preparing and filing the state court debt collection complaint.

***3** Here, defendants urge this Court to depart from its prior rulings and hold that they are entitled to absolute immunity

from the Kellys' complaint. Defendants cite *Etapa v. Asset Acceptance Corp.* (unreported), E.D. Kentucky Case No. 03-86-KSF, Order dated April 29, 2004. There, on facts almost identical to those in *Hartman, supra,* the district court granted Asset's motion for judgment on the pleadings, holding that the FDCPA did not abrogate common law witness immunity. *Etapa* relied on the analysis in *Briscoe v. Lahue,* 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), which held that trial witnesses are absolutely immune from liability under 42 U.S.C. § 1983. The Supreme Court found that Congress did not intend to abrogate the common law doctrine immunizing a trial witness from subsequent tort liability, when Congress passed the 1871 Civil Rights Acts.

To similar effect is *Beck v. Codilis & Stawiarski, P.A.,* 2000 U.S. Dist. LEXIS 22440 (N.D.Fla., Dec. 26, 2000). There, a lender's attorney filed an affidavit in the lender's foreclosure action attesting to the hours he spent on the foreclosure suit, and the hourly rate he charged to the lender. In fact, the attorney charged the lender a flat fee for the foreclosure. The district court held that witness immunity absolutely protected the attorney from the borrowers' FDCPA claims, and that any sanction for the false affidavit must come from the state bar, not the FDCPA.

However, as this Court noted in *Hartman,* many courts have concluded that the FDCPA applies to "testimonial" documents and to pleadings filed in state court debt collection actions. See, e.g., *Miller v. Wolpoff & Abramson,* 321 F.3d 292 (2nd Cir.2003) [verified complaint filed by defendant attorneys subject to FDCPA]; *Gearing v. Check Brokerage Corporation,* 233 F.3d 469 (7th Cir.2000) [debt collector's complaint subject to FDCPA]; *Tomas v. Bass & Moglowski, P.C.,* 1999 U.S. Dist. LEXIS 21533 (W.D. Wisc., June 29, 1999) [summons and complaint in state replevin action subjected attorney to FDCPA liability]; *Campos v. Brooksbank,* 120 F.Supp.2d 1271 (D.C.N.M.2000) [attorney's

fee affidavit and deposition notice subject to FDCPA]; *Jacquez v. Diem Corp.,* 2003 U.S. Dist. LEXIS 8333 (D.C.Ariz. February 20, 2003) [writ of garnishment signed by debt collector subject to FDCPA]. None of these cases discuss any potential immunity defense.

[3] Congress legislates against a background of common-law adjudicatory principles. Where a common law principle is well established, "... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Savings & Loan Assn. v. Solimino,* 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). Congressional findings concerning the FDCPA noted that "Existing laws and procedures for redressing [abusive debt collection practices] are inadequate to protect consumers." The FDCPA, as noted above, is a broad remedial statute, regulating conduct far broader than that which might lead to tort liability for defamation or libel, the types of claims to which the witness immunity doctrine is primarily concerned. Congress clearly intended to regulate the "process" of debt collection, and nothing suggests that Congress intended to absolutely immunize legal proceedings from the statute's reach. In fact, just the opposite is true. As originally passed, the statute excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client" from the definition of "debt collector." Pub.L. 95-109, § 803(6)(F). Plainly Congress intended not to regulate attorneys engaged in debt collection litigation for their clients. But Congress repealed the attorney exemption in 1986 without creating a litigation or litigation-related exception for attorneys or for traditional debt collectors.

***4** Moreover, after that statutory change, the Supreme Court unanimously held that the FDCPA applies to lawyers' "litigation activities." See *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). There, a bank's

attorney filed suit against a debtor and, during the course of the litigation, sent a letter to the debtor's attorney trying to settle the case. The complaint and the letter both erroneously sought recovery of an amount for insurance coverage which turned out to be beyond the scope of the original loan agreement. The debtor then sued the attorney under several provisions of the FDCPA. The Seventh Circuit held the attorney was subject to the statute, disagreeing with the Sixth Circuit's contrary opinion in *Green v. Hocking,* 9 F.3d 18 (6th Cir.1993). The Supreme Court affirmed the Seventh Circuit, rejecting the Sixth Circuit's rationale set forth in *Green,* that subjecting litigation-related activities to FDCPA liability would create intolerable conflicts.

[4] The defendants' motion also suggests that a "litigation" privilege protects them from the FDCPA. This state law privilege protects all actors in judicial proceedings from subsequent liability for acts and conduct related to the proceeding. See, e.g., *Surace v. Wuliger,* 25 Ohio St.3d 229, 235, 495 N.E.2d 939 (1986): "While the imposition of an absolute privilege in judicial proceedings may prevent redress of particular scurrilous and defamatory allegations that tend to harm the reputation of the person defamed, a contrary rule, in our view, would unduly stifle attorneys from zealously advancing the interests of their clients in possible violation of the Code of Professional Responsibility, and would clog court dockets with a multitude of lawsuits based upon alleged defamatory statements made in other judicial proceedings."

This Court concluded in *Hartman* that the FDCPA trumps this state law litigation privilege. And there seems little doubt that a state privilege must yield to a federal statute in these circumstances. See, e.g., *Steffes v. Stepan Co.,* 144 F.3d 1070 (7th Cir.1998), rejecting application of absolute litigation privilege to discovery conduct in a Title VII/ADA case. The defendant's supplemental memorandum (Doc. 9) concedes this point.

If the defendants are advocating the existence of a federal common law litigation privilege, *Heintz v. Jenkins* cuts squarely against their argument. So the defendants also premise their immunity arguments on their First Amendment rights of free speech, and to petition for redress, which they assert are violated by applying FDCPA to the act of filing a complaint in a court of law. But whether the historical antecedents for common law immunity emanate from First Amendment concerns, or from the underpinnings of the Anglo-American privilege for judicial proceedings, the defendants' immunity arguments cannot overcome the unambiguous text of the statute and the unambiguous holding of *Heintz v. Jenkins,* which this Court must follow.

***5** Defendants then resort to arguments based on FDCPA's legislative history, which do not support a different result. Whatever that history may indicate about Congressional intent to include attorneys and litigation-related conduct within the reach of the statute, it is the words Congress used in the statute that matter. The Sixth Circuit has made it abundantly clear that the courts must apply unambiguous statutes as written, even when that application may lead to unintended or anomalous results. See, *Olden v. LaFarge Corp.,* 383 F.3d 495, 504-505 (6th Cir.2004). See also, *Thomas v. Simpson & Cybak,* 392 F.3d 914, 918-919 (7th Cir.2004), where the en banc Seventh Circuit rejected a law firm's argument that the FDCPA's plain language should be ignored, because making service of a summons and complaint subject to FDCPA liabiity would unreasonably interfere with litigation activities by debt collection attorneys.

[5] Nor can this Court agree with defendants' argument that the FDCPA is an unconstitutional exercise of Congressional Commerce Clause powers. This Court rejected a similar argument in *Blevins v. Hudson & Keyse, supra,* noting that federal statutes are presumptively valid, even in the face of a

constitutional challenge. See *Fullilove v. Klutznick,* 448 U.S. 448, 472, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). Moreover, there is nothing in the FDCPA that purports to regulate the practice of law, only the practice of debt collection. Neither of the defendants argue that conforming their conduct to the FDCPA would require them to violate any law or rule that governs either debt collection or the practice of law. The Court finds that the FDCPA does not violate the Tenth Amendment nor the Commerce Clause.

Finally, defendants "public policy" arguments are appropriately directed to Congress, not to this Court. The Court notes, however, that defendants' dire predictions about the chilling effects of the "Damocles sword" of FDCPA liability are rather overstated. As noted in *Taylor v. Luper, Sheriff & Niedenthal Co., LPA,* 74 F.Supp.2d 761, 765 (S.D.Ohio 1999), FDCPA liability is not imposed for good faith mistakes or errors of law or mathematics. The FDCPA's statutory "bona fide error" defense is available here, as it is to all debt collectors covered by the statute.

C. Plaintiffs' Claims Under the FDCPA.

Plaintiffs allege that the defendants violated four subsections of the FDCPA. Each is discussed in turn.

[6] *Section 1692d* prohibits conduct when its "natural consequence" is to "harass, oppress, or abuse" a debtor. The section lists several examples of conduct intended to be covered, including threats of violence, use of obscene or profane language, causing a phone to repeatedly ring with intent to annoy, abuse or harass a person, and so forth. The Court finds that the filing of a complaint in an appropriate venue is not the kind of conduct covered by § 1692d as a matter of law. The examples listed in § 1692d make this plain. Moreover, the "natural consequence" of filing a lawsuit

is to bring the issue to the court for resolution, not to "harass, oppress, or abuse" the defendant. Plaintiffs' claim under section 1692d is therefore dismissed.

***6** *Section 1692e* generally prohibits false, misleading or deceptive representations in connection with debt collection. The Court must apply the objective "least sophisticated consumer" standard in order to determine if the statement was deceptive or misleading. For example, in *Lewis v. ACB Business Services, Inc.,* 135 F.3d 389 (6th Cir.1998), a debt collector's letter was "signed" by a non-existent person. The Sixth Circuit rejected the argument that the use of an alias was deceptive, even though the statement was undeniably false. The Court noted that the false statement did not cause any prejudice or harm to the Plaintiff, and that use of an alias was not deceptive within the statutory meaning.

[7] *Subsection 1692e(2)* prohibits the false representation of "the character, amount, or legal status" of a debt. Plaintiffs allege that defendants violated this section because the amount and/or the legal status of the debt was falsely represented in the state court complaint. Assuming the statement was false, which the Court must for purposes of Rule 12, is that alone sufficient to impose FDCPA liability? The Seventh Circuit concluded that a literally false statement in a collection letter violates the FDCPA as a matter of law. See, *Avila v. Rubin,* 84 F.3d 222, 227 (7th Cir.1996). And, after *Lewis,* where a per se false statement was apparently not enough without "deception," the Sixth Circuit suggested in an unpublished opinion that an "incorrect" representation in a collection letter is sufficient under section 1692e(2) to withstand a motion to dismiss, without discussing its deceptive or misleading character. See, *Savage v. Hatcher,* 2004 U.S.App. LEXIS 19210 at *6 (6th Cir., September 7, 2004). The Court therefore must deny the motion to dismiss Plaintiffs' claim under section 1692e(2).

[8] *Section 1692e(5)* proscribes "threats to take any action that cannot legally be taken or that is not intended to be taken." This section is most obviously aimed at the typical "dunning letter," threatening imminent litigation if the debtor doesn't "pay up." *Section 1692e(10)* is a catch-all clause that prohibits "The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Plaintiffs allege that both sections were violated by the filing of the state court complaint. This Court cannot dismiss the claims under these subsections for the same reasons discussed above concerning section 1692e(2).

[9] *Section 1692f(1)* prohibits the attempt to collect any debt or additional obligation such as interest, fees, charges or expenses, "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." There is no doubt that filing a lawsuit is an "attempt to collect a debt." The Court cannot now resolve the question of whether or not the debt as stated in the state court complaint was authorized by the original debt agreement, or otherwise permitted by applicable law. The motion to dismiss this claim is denied.

D. *The Ohio Consumer Sales Practices Act Claims.*

*7 Plaintiffs also allege that defendants state court complaint violated several subsections of the OCSPA. The Ohio courts have applied the OCSPA to debt collectors. See, *Broadnax v. Greene Credit Service,* 118 Ohio App.3d 881, 893, 694 N.E.2d 167 (Ohio App.1997), *app. den.,* 79 Ohio St.3d 1483, 683 N.E.2d 787 (1997). So too has the Sixth Circuit. See *Schroyer v. Frankel,* 197 F.3d 1170, 1177 (6th Cir.1999).

Because the Court is not dismissing Plaintiffs' federal claims, the Court will retain supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs may

pursue both federal and state claims at this juncture. The Ohio statute plainly permits a private plaintiff to seek declaratory or injunctive relief; see R.C. 1345.09(D). It would be premature to dismiss that prayer for relief on a Rule 12 motion without the development of a factual record.

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss Plaintiffs' Complaint is denied, with the exception of Plaintiffs' claim under Section 1692d of the FDCPA, which is dismissed. The first motion for leave to file a supplemental memorandum (Doc. 9) is granted. The second motion for leave to file a copy of an appellate brief (Doc. 24) is denied.

FN1. Individual JBR attorneys, originally named as defendants, have been dismissed since the motion was filed (Doc. 10).

FN2. An appeal from this Court's order is pending before the Sixth Circuit, Docket No. 04-4369.

United States Court of Appeals,Sixth Circuit.
Alice G. KELLY; Norman P. Kelly, Plaintiffs-Appellees,
v.
GREAT SENECA FINANCIAL CORP.; Javitch, Block & Rathbone, Defendants-Appellants.
No. 05-3830.

ORDER

BEFORE: SUHRHEINRICH, GILMAN, and ROGERS, Circuit Judges.

(Filed August 31, 2006)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

CONSTITUTION OF THE UNITED STATES

ARTICLE 1, SECTION 8, CLAUSE 3.

The Congress shall have Power To ...

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

AMENDMENT I. FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692f

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> (B) there is no present intention to take possession of the property; or
> (C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International

Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to

transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(c) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.